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STATE OF NORTH CAROLINA 2017

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IN THE OFFICE OF
ADMINISTRATIVE HEARINGS

COUNTY OF LENOIR 17 EDC 01626

OFFICE OF ADMIN HEARINGS

<p>██████ by parent or guardian ██████. Petitioner,</p> <p>Lenoir County-Kinston NC Lenoir County Board of Education Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER was heard before the Honorable Stacey B. Bawtinheimer, Administrative Law Judge Presiding, on the following dates: April 3-4 and 24-27, 2017. After hearing the evidence presented and considering the written and oral arguments of the parties, the Undersigned has determined that the Respondent committed numerous procedural errors during the referral and eligibility process, but as ██████ ultimately did not qualify as a student with a disability for IDEA purposes, no remedy exists for these procedural violations under the IDEA. Moreover, ██████ was not eligible for services, ██████ was not denied a free and appropriate public education and the contested case must be dismissed with prejudice.

APPEARANCES

For Petitioners: ██████ pro se
2031 Christian Lane
Kinston, NC 28504

For Respondent: ██████
Tharrington Smith, L.L.P.
150 Fayetteville Street, Suite 1800
PO Box 1151
Raleigh, NC 27602-1151

WITNESSES

For Petitioners: ██████, Petitioner
████████████████████, Contract School Psychologist
████████████████████, School Psychologist
████████████████████, K-12 Compliance Specialist
████████████████████, Principal ██████████ School
████████████████████, Exceptional Children's Director
████████████████████, High School Math Teacher
████████████████████, Principal Charter School

For Respondents: See above

EXHIBITS

The following Stipulated Exhibits were received into evidence at the start of the hearing:

Stipulated Exhibits Nos. 7, 8, 12-22, 24-25, 28, 30-43 ("Stip. 1, Stip.2," etc.).

The following exhibits were received into evidence during the hearing:

Petitioners' Exhibits 1-5, 7 — 12, 14, and 15 ("Pet. Ex. 3, Pet. Ex. 4," etc.);

Respondents' Exhibits 23, 29, and 46 ("Resp. Ex. 1, Resp. Ex. 2," etc.).

The exhibits have been retained as part of the official record of this contested case. .

PROCEDURAL BACKGROUND

1. Petitioner filed this Petition for Contested Case pro se on March 7, 2017. The Petition was placed on an expedited calendar because the Petition indicated that Petitioner was challenging a manifestation determination, which occurred on November 8, 2016.
2. Hearing was scheduled to begin on April 3, 2017. Due to the lack of a court reporter at the appointed time, a pre-hearing conference was held on the morning of April 3rd. The hearing began the afternoon of April 3, April 4 and April 24-27, 2017.
3. On April 26, 2017 Respondent made an oral motion to dismiss the Petition based on mootness, which was denied from the bench.
4. The parties were offered the option of waiting for completion of the transcripts prior to drafting their proposed decisions, but Petitioner declined and, instead, preferred an expedited decision by May 11, 2017 pursuant to IDEA, 20 U.S.C. 1415(k)(4)(B).

ISSUES

After conferring with the parties during the pre-hearing conference and reviewing the Petition and Response, the Undersigned identified the following issues for this hearing:

1. Whether [REDACTED] is a "student with a disability" or a "suspected student with a disability" as defined by the IDEA, and if so, whether Respondent violated the provisions of the IDEA by failing to designate him as such ("Eligibility Issue");
2. If [REDACTED] is a "student with a disability" or a "suspected student with a disability," whether Respondent violated the requirements of the IDEA regarding discipline of

students with disabilities, specifically about his suspensions on November 15, 2015 for drug possession and October 6, 2016 for weapon possession on school grounds ("Manifestation Issue"); and,

3. If [REDACTED] is a "student with a disability" or a "suspected student with a disability," whether Respondent provided him with a free appropriate public education during the 45* day alternative setting for a weapon violation and, thereafter, during the long-term suspensions the remainder of the 2016-2017 school year period ("FAPE Issue").

Petitioner [REDACTED] raised other issues pertaining to appropriateness of the school board's disciplinary proceedings, the appropriateness of the search by the school resource officer, the failure of witnesses to attend the disciplinary appeal hearing, and other actions by school staff which are outside the jurisdiction of this Tribunal. [REDACTED] main concern was that she "[did] not want him to become a dropout statistic." Stip. Ex. 24, pp. 89 & 92. The Undersigned sincerely hopes that [REDACTED] will not become another victim of the "School to Prison Pipeline." ¹

BURDEN OF PROOF

As the Petitioner in this matter, [REDACTED] has the burden of proof. The standard of proof is by a preponderance of the evidence. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005); N.C. Gen. Stat. 150B-34(a). North Carolina statutory law states that actions of local boards of education are presumed to be correct and "the burden of proof shall be on the complaining party to show the contrary." N.C. Gen. Stat. 115C-44(b). The Petitioner, being the complaining party, has the burden of showing, by a preponderance of the evidence, that [REDACTED] is a student with a

disability as defined by the IDEA, that the manifestation determination was incorrect, and that Respondent denied [REDACTED] a free appropriate public education.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following FINDINGS OF FACTS.

In making the FINDINGS OF FACTS, the undersigned Administrative Law Judge has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate facts for judging credibility, including, but not limited to, the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences, about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case including but not limited to the IEPs, Prior Written Notices,

¹ Sarah E. Redfield & Jason P. Nance, *The American Bar Association Joint Task Force on Revising The School-To-Prison Pipeline Preliminary Report* 10 (2016).

correspondence, IEP minutes, eligibility records, disciplinary records, Section 504 documents, and other educational records of [REDACTED]

1. [REDACTED] is a [REDACTED] student currently enrolled in the [REDACTED] in Lenoir County Public Schools ("LCPS") at the [REDACTED] ("[REDACTED]"), an [REDACTED] school. Stip. Ex. 42. Although [REDACTED] mother resides in [REDACTED], North Carolina, at all times relevant to this proceeding [REDACTED] has resided with his [REDACTED] and [REDACTED] in Lenoir County, North Carolina.
2. In September 2015, for his [REDACTED] year [REDACTED] transferred to LCPS from the [REDACTED] System. Pet. Ex. 15. His most recent school assignment in [REDACTED] was an [REDACTED] school, where he was placed after being found to be in possession of marijuana at school. (testimony of [REDACTED]).
3. There was no evidence provided from either party that the [REDACTED] System or any other public school system had found [REDACTED] eligible as a student with a disability prior to his transfer to LCPS.

2015-2016 School Year Long-Term Suspension and IDEA Referral

4. For the 2015-2016 school year, [REDACTED] was enrolled in [REDACTED] School ("[REDACTED]").

First Long-Term Suspension (Drugs) and First IDEA Referral on November 16, 2015:

5. Within two months of his enrollment, (November 16, 2015), [REDACTED] was suspended from [REDACTED] for the remainder of the school year after he was found to be in possession of marijuana during a random search on campus ("first long-term suspension"). (testimony of [REDACTED]); (testimony of [REDACTED]). He was transferred to the [REDACTED], for the remainder of the 2015-2016 school year.
6. On November 16, 2015, after his first long-term suspension in the 2015-2016 school year, [REDACTED] met with [REDACTED], [REDACTED] Assistant Principal, and asked to have [REDACTED] tested to see if he qualified for the Exceptional Children's Program ("EC Program"). (testimony of [REDACTED]). Ms. [REDACTED] handed her a form to complete and [REDACTED] filled it out while sitting in Ms. [REDACTED] office, (testimony of [REDACTED]).
7. After [REDACTED] handed the completed form to Ms. [REDACTED], she threw the form in the trash because [REDACTED] was being recommended for long-term suspension. (testimony of [REDACTED]). Per [REDACTED], Ms. James informed L.J. that she would need to wait until he enrolled at his next location to complete the form. (testimony of [REDACTED]). Ms. [REDACTED] did not testify at the contested case hearing to rebut these allegations.
8. The Undersigned finds that [REDACTED] was credible and sincerely concerned about her grandson's best interests. [REDACTED] had retired from a 30-year career as a public school English teacher and was knowledgeable about special education referrals.

9. During her testimony and excellent case presentation as pro se litigant, [REDACTED] was precise and accurate in her recollection of dates and events. She was, however, more eloquent to the Undersigned with what she did not say. Such as why, as an English teacher with 30 years' experience, did she not testify about [REDACTED] reading ability? Or, why [REDACTED] had had two long-term suspensions from two different school districts for marijuana possession² and what was the educational impact, if any, of [REDACTED] 's drug use?
 10. [REDACTED] introduced into evidence a copy of the Parent 's Rights Handbook which she picked up from the school as she was leaving Ms. [REDACTED] office. Pet. Ex, 14. The date 11/16/15 was handwritten by [REDACTED]. on the Parent's Rights Handbook, See Pet. Ex. 14; (testimony of [REDACTED]).
 11. Because of the grave illness of [REDACTED] mother, she did not follow through with the referral at the [REDACTED] until February 2016. (testimony of [REDACTED].) See Pet. Ex. 1, p. 6; . Stip. Ex. 24, p. 89.
 12. Respondent contends that this referral was not raised by the Petitioners in the Petition and is barred by the one-year statute of limitations. The Undersigned notes that the Petition did reference this first request for evaluation in November 2015 as part of the "problem". See Petition 112, p. 2. Moreover, Ms. [REDACTED] actions misrepresented the referral process and Respondent failed to provide the statutory notice necessary to invoke the statute of limitation's defense.
 13. LCPS's failure to conduct an expedited evaluation immediately after the initial referral on November 16, 2015 was a procedural violation. [REDACTED] contended that had the evaluation process been timely, [REDACTED] would have been found eligible for EC services and not remained in the alternative placement.
 14. The Undersigned does find that the destruction of [REDACTED] first referral and the failure of LCPS to conduct an expedited evaluation were procedural violations of the IDEA.
 15. However, [REDACTED] offered no expert testimony or documentation to prove that [REDACTED] was a student with a disability, a "suspected" student with disabilities, or otherwise a student eligible for EC services from November 16, 2015 until the end of the 2015-2016 school year; therefore, this procedural violation did not result in a violation of the IDEA.
 16. This procedural violation does, however, suggest that the EC staff needs to conduct additional training on the IEP referral process especially in the high schools and alternative schools where students are not typically referred.
 17. Throughout the remainder of the 2015-2016 school year, [REDACTED] seemed to have done well academically and emotionally at the [REDACTED] according to his math teacher and mentor Mr. [REDACTED]. (testimony of [REDACTED]).
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² "Drug and alcohol addicted children are not 'children with disabilities' within the meaning of G.S. 115C-106.3(1) unless because of some other condition they meet that definition" N.C.G.S.

115c-149.

Second IEP Referral on February 26, 2016:

18. On or about February 26, 2016, [REDACTED] presented a letter to the [REDACTED] staff in which she requested that [REDACTED] "be tested to see if he qualifies for an individual education plan through the EC program." Stip. Ex. 24, p. 89.
19. Upon receipt of this letter, the [REDACTED] staff began the process of classroom interventions through the Student Support Team. Resp. Ex. 23; (testimony of [REDACTED]); (testimony of [REDACTED]).
20. An IEP team was convened on April 14, 2016, with the participation of [REDACTED]. Stip. Exs. 13, 16; (testimony of [REDACTED]). The IEP team agreed to conduct an evaluation of [REDACTED]. Stip. Ex. 15. The team requested assessments in the following areas: psychological, educational, social developmental history, and behavior rating scales. Stip. Ex. 14, p. 28.

Broadwell Evaluation April 27, 2016:

21. On April 27 2016, [REDACTED], a private psychologist on contract with the school system, conducted a psychoeducational assessment of [REDACTED]. ("[REDACTED] Evaluation"). She documented that the reason for referral was that: [REDACTED] is reported to be weak in academics and behavior. He has problems with compliance, tardiness, and sleeping in class. A PEP was developed on 03/07/16. Classroom observations indicated that [REDACTED] is strong academically but can be argumentative and confrontational. He engages in inappropriate language." Stip. Ex. 17, p. 35.
 22. Ms. [REDACTED] reported on the student history that [REDACTED] said: [REDACTED] has trouble with changes and has difficulty making friends. He has difficulty forming relationships with adults. Behavioral and emotional difficulties are reported. [REDACTED] seems impulsive and has fears. He is reported to overreact and seems unhappiness [sic] most of the time. Strengths are reported to be athletics and math. Weaknesses are reported in his isolation and difficulty expressing himself." Stip. Ex. 17, p. 35.
 23. Ms. [REDACTED] evaluation revealed that [REDACTED] had cognitive ability in the low average to average range (full scale IQ = 78)³, with a weakness in fluid reasoning (69) and strengths in working memory (94) and processing speed (95). Stip. Ex. 17, p. 37; (testimony of [REDACTED]). On tests of academic achievement, [REDACTED] scores were commensurate with or higher than his measured ability on all except a subtest of reading passage comprehension, on which he scored a 57. Stip. Ex. 17, p. 37.
 24. Ms. [REDACTED] provided her report to the school system, and it was reviewed by staff members including [REDACTED] and school psychologist [REDACTED]. Both Ms. [REDACTED] and Ms. [REDACTED] testified that they saw the reading passage comprehension score as
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³ A standard score of 100 is at the mean with scores from 90 to 109 defining the average range. Stip. Ex. 18, p. 42. A standard score of 78 is well below the average range, but [REDACTED] other I.Q. subtest scores were in the average range other than the low fluid reasoning score of 69. stip. Ex. 17, p. 37.

concerning or a "red flag." (testimony of [REDACTED]); (testimony of [REDACTED]). They were concerned because of the sheer difference between the reading score and [REDACTED] other academic scores. Id. Ms. [REDACTED] also noted that [REDACTED] teachers had not previously identified any significant reading concerns in the classroom. (testimony of [REDACTED]).

[REDACTED] Evaluation May 13, 2016:

25. Because of these concerns about the outlying reading score, [REDACTED], a psychologist employed by the school system, conducted an additional reading assessment ("[REDACTED] Evaluation"). Ms. [REDACTED] administered the Wechsler Individual Achievement Test — Third Edition ("WIAT-III") to [REDACTED]. He scored a 99, well within the average range. stip. Ex. 18, p. 42.
26. [REDACTED] objected to this retesting of [REDACTED] reading comprehension score because [REDACTED] indicated on her report that the results were a "valid estimate of his current functioning." (testimony of [REDACTED]); Stip. Ex. 17, p. 36 (testimony of [REDACTED]).
27. Ms. [REDACTED] also compiled the Behavior Assessment System for Children ("BASC-2"). The BASC-2 rating scales were completed by Petitioner [REDACTED] and one of [REDACTED] teachers, [REDACTED]. On the BASC-2, the only symptom rated in the "clinically significant" range by his grandparent was "anxiety." Stip. Ex. 18, p. 43. The school rater did not see clinically significant anxiety behaviors, but did provide clinically significant ratings in the area of "withdrawal." Stip. Ex. 18, p. 43.
28. As described by the BASC-2, [REDACTED] "exhibits more difficulty in the home/community environment than in the school setting... He exhibits behavior associated with anxiety at home and withdrawal at school. Both [REDACTED] and [REDACTED] report concerns about developmental social disorders such as problems with functional communication and social skills." Stip. Ex. 18, p. 44.
29. Overall, [REDACTED] reported problems at home were more extreme than those reported by his teacher which is consistent with Ms. [REDACTED] conclusion that [REDACTED] had more difficulty in the home environment. Stip. Ex. 18, p. 44.
30. [REDACTED], who taught [REDACTED] math during the 2015-2016 and 2016-2017 school years at [REDACTED], testified that from his observations [REDACTED] could complete grade-level math work independently and well. (testimony of [REDACTED]). [REDACTED] also testified that his class requires a considerable amount of reading at times, and that he has observed [REDACTED] to have no difficulties reading grade-level material. Id. [REDACTED] stated that "he had no concerns about [REDACTED] ability to do grade level material." Id.
31. The Undersigned has reviewed the psychological evaluation reports and does not find reason to discredit the results of [REDACTED] assessment, which showed reading

comprehension ability in the average range (and well above [REDACTED] measured cognitive ability). No other evidence was introduced that would support Petitioner's theory that [REDACTED] had a specific learning disability in reading.

32. The Undersigned finds [REDACTED] testimony compelling. As [REDACTED] former mentor and math teacher for both relevant school years, [REDACTED] discernment about [REDACTED] academic abilities and behavioral issues carried great weight. His fondness and concern for [REDACTED] were evident, during his testimony and this bolstered his credibility.
33. [REDACTED] corroborated [REDACTED] testimony about [REDACTED] change in attitude towards school during the two school years. [REDACTED] testified that during the 2015-2016 school year [REDACTED] was often focused and successful in class, and although he had numerous absences he could make-up missed work quickly. Ids [REDACTED] also stated that during the 2015-2016 school year [REDACTED] understood grade level material, could communicate well with others, and had no behavioral problems other than chronic absenteeism and sleeping in class. Id.
34. During the 2016-2017 school year, however, [REDACTED] testified that [REDACTED] had become a "different student," frequently absent, slept in class, and not participating when he is present. Id. Although [REDACTED] was no longer [REDACTED] designated mentor, [REDACTED] unsuccessfully attempted to communicate with [REDACTED] about why his attitude towards school had soured during the 2016-2017 school year. Id.
35. [REDACTED] contends this change was because [REDACTED] was unlawfully sent to the [REDACTED] for another year instead of a regular high school with his peers and that he suffered from depression. (testimony of [REDACTED]). [REDACTED] himself did not testify as to his emotional state nor has a mental health professional diagnosed [REDACTED] with depression. Without a mental health diagnosis, the Undersigned cannot speculate about the reasons for [REDACTED] emotional state or behaviors during the 2016-2017 school year.

May 23, 2016 IEP Eligibility Meeting:

36. Eighty-seven (87) days after the second written referral on February 26, 2016, the IEP team reconvened on May 23, 2016 ("May 2016 IEP Meeting"), to review the evaluation results. Petitioner [REDACTED] attended this meeting, and [REDACTED] mother participated by phone. After reviewing the evaluation results and other available information, the team determined that [REDACTED] did not qualify for services under the IDEA as a student with a specific learning disability. Stip. Ex. 19-20.
37. At the time of the May 2016 IEP meeting, [REDACTED] was not receiving mental health treatment and had not been diagnosed with any medical or mental health disorder. [REDACTED] reviewed the psychoeducational evaluations. (testimonies of [REDACTED] and [REDACTED]). Per [REDACTED] Respondent's failure to have a school psychologist at the meeting to interpret the psychoeducational evaluations was a procedural error. Id.

38. Neither [REDACTED] nor [REDACTED] attended the May 23, 2016, IEP meeting. Stip. Ex. 19-20; (testimonies of [REDACTED] and [REDACTED]). Compliance Specialist [REDACTED] testified that she was responsible for presenting and interpreting the evaluation results at the IEP meeting. (testimony of [REDACTED]); (testimony of [REDACTED]). [REDACTED] is not a psychologist, but is familiar with the administration and standardized scoring of cognitive and achievement tests such as the Woodcock Johnson and Wechsler. (testimony of [REDACTED]).
39. [REDACTED] testified that if a parent has a concern about a psychoeducational evaluation, then the school psychologist could be called during the IEP meeting to answer any questions. (testimony of [REDACTED]). There is no evidence that [REDACTED] was told of this option. The Undersigned finds that Respondent's failure to have a psychologist at the May 2016 IEP meeting was a procedural violation.
40. At the IEP meeting, unbeknownst to [REDACTED], she was provided with an incomplete copy (pages 2 and 4 were missing) of the [REDACTED] Evaluation. (testimony of [REDACTED]). Later, [REDACTED] raised this concern about the missing pages in an August 23, 2016 letter to the Superintendent. In response, EC [REDACTED] provided her with a full copy of the report. Stip. Ex. 24, pp. 99-101, 106-107. [REDACTED] testified that she believed this omission was due to an inadvertent copying error. (testimony of [REDACTED]).
41. Only the eligibility category of special learning disabled was discussed at the meeting even though the paperwork for the serious emotional disturbance category ("SED") had been completed. (testimony of [REDACTED]); Stip. Ex. 20, pp. 52-56. [REDACTED] testified that the IEP team did not review the SED worksheet although the BASC-2 scores were discussed. (testimony of [REDACTED]).
42. [REDACTED] testified that the IEP Team predetermined that [REDACTED] was not eligible as a child with special needs and that she had no opportunity to participate in that decision. (testimony of [REDACTED]).
43. When asked if he participated in the eligibility decision, [REDACTED] corroborated [REDACTED] testimony that they did not participate in the decision-making process. [REDACTED] stated that he did not "help with the determination" and "no one asked me to make an eligibility determination." (testimony of [REDACTED]).
44. As the Undersigned, has already found [REDACTED] credible with respect to other matters, the Undersigned has no reason to question his credibility on this issue either, especially when his testimony did not change during cross examination, The Respondent's predetermination of the eligibility decision is another procedural violation of the IDEA and interfered with the Petitioner's right to meaningfully participate in the IEP meeting.
45. At the end of the meeting, after the team determined [REDACTED] did not have a specific learning disability, Petitioner [REDACTED] stated that she believed he might have AttentionDeficit/Hyperactivity, Disorder ("ADHD"). [REDACTED] informed her that ADHD was a medical condition that must be diagnosed by a doctor. Stip. Ex. 19. L.J. subsequently had some of [REDACTED]'s teachers at [REDACTED] fill out ADHD rating scales to be reviewed by a

health care provider. Stip. Ex. 24, p. 98; (testimony of [REDACTED]). However, the provider did not diagnose [REDACTED] with ADHD and Petitioner no longer contends that he has ADHD. (testimony of [REDACTED]).

46. [REDACTED], a public-school administrator of 31 years and witness for Petitioners, testified in his opinion based on the pattern of decline in [REDACTED] End of Grade/Course scores, [REDACTED] failed grades, and the discrepancy in reading comprehension in the [REDACTED] Evaluation that [REDACTED] should have been found eligible for EC services. Even though [REDACTED] was not formally proffered as an expert witness, the Undersigned does not doubt [REDACTED] sincerity and expertise. Because the Petitioner had not provided [REDACTED] copies of all the exhibits in sufficient time⁴ for him to review them, [REDACTED] was unaware of the subsequent [REDACTED] Evaluation which showed a normal reading comprehension score and the documentation of [REDACTED] extensive absenteeism and tardiness to class which according to [REDACTED] greatly impacted [REDACTED] failing grades. As [REDACTED] opinion relied primarily on the [REDACTED] Evaluation and limited documentation favorable to the Petitioners his credibility was compromised and the Undersigned affords his testimony little weight.
47. Petitioner [REDACTED] testified at hearing that she believed [REDACTED] should have been found eligible as a student with a specific learning disability in reading. (testimony of [REDACTED]). She testified that she also believed he would qualify as a student with a serious emotional disturbance ("SED"), based on his anxiety and perhaps other mental health concerns. Id.
48. Despite multiple requests from the Undersigned and Respondent, Petitioner was unable to produce any evidence of a medical diagnosis of anxiety disorder, depression, or any other medical or mental health disorder prior to the May 23, 2016. (testimony of [REDACTED]). After the eligibility meeting on September 29, 2016, Petitioner did produce a report from a licensed professional counselor stating that he had "diagnosed" [REDACTED] with oppositional defiance disorder ("ODD"). (testimony of [REDACTED] about Stip. Ex. 27 not offered into evidence).
49. A December 22, 2016 note from a different provider stated that a "formal evaluation" of [REDACTED] for anxiety and ADHD were forthcoming. Stip. Ex. 37, p. 131. [REDACTED] also produced a more recent report from the same provider dated January 25, 2017 which simply stated that someone else had diagnosed [REDACTED] with ODD. Stip. Ex. 39.
50. After the Petition was filed, on March 7, 2017, [REDACTED] produced a note from [REDACTED] about his treatment of [REDACTED] for "defiant, anxiety, and substance abuse (marijuana) issues." Pet. Ex. 4. [REDACTED] did not make any specific diagnosis, or reference to a diagnosis in his most recent report. Petitioner confirmed at hearing that no further evaluation was completed because she did not believe it was necessary or that [REDACTED] would cooperate with any additional testing. (testimony of [REDACTED]).

2016-2017 School Year Section 504 Referral

51. [REDACTED] was returned to [REDACTED] School for the 2016-2017 school year.

⁴ Petitioners listed [REDACTED] as a potential witness prior to the April 3, 2017 hearing date. [REDACTED] testified on the last day of the hearing (April 27, 2017) that he only had time to review a few of the approximately 147 pages of exhibits because he had only just received them the prior evening. Petitioners' failure to provide [REDACTED] all the exhibits in sufficient time for his comprehensive review greatly affected the probative value of his testimony.

Section 504 Referral:

52. This Tribunal does not have jurisdiction over evaluations or eligibility determinations under the Rehabilitation Act of 1973 ("Section 504"), but this information is provided for historical context and to the extent that [REDACTED] might be a suspected student with a disability pursuant to the IDEA for disciplinary purposes.
53. On or about August 23, 2016, [REDACTED] sent a letter to the Superintendent, with a copy to EC [REDACTED]. Stip. Ex. 24, pp. 99-101. In this letter, [REDACTED] requested services under Section 504. Id. at 99.
54. In response, [REDACTED] contacted the school guidance counselor to initiate the Section 504 evaluation, and met with the school staff to ensure they were familiar with the 504 process. (testimony of [REDACTED]).
55. On August 29, 2016, Petitioner was provided with paperwork regarding the Section 504 evaluation. She did not return the signed consent for evaluation to the school until September 29, 2016. (testimony of [REDACTED]). At that time, she also returned the "Section 504 Physician's Report," filled out by [REDACTED], a licensed professional counselor ("LPC") and licensed substance abuse counselor ("LCAS")⁵. Stip. Ex. 27. The form stated that [REDACTED] diagnosed [REDACTED] with oppositional defiant disorder ("ODD"). [REDACTED] reported that ODD "has a persistent pattern of irritability, inc [sic] being argumentative, being defiant and noncompliant towards rules from authoritative figures." His recommendations included allowing a "cooling down break," limiting arguments with the student, and providing positive feedback and validation when the student is upset. Id.
56. LCPS staff testified that none of them witnessed any overt defiant behavior when interacting with [REDACTED] and that when asked to do certain tasks, [REDACTED] was compliant. (testimony of [REDACTED]); (testimony of [REDACTED]).
57. [REDACTED] therapy sessions with [REDACTED] began July 14, 2016 after the May 2016 eligibility meeting. Pet. Ex. 4. Petitioner testified that [REDACTED] provided substance abuse counseling as well as general counseling to [REDACTED] and acknowledged that this counseling may have been ordered or recommended by the juvenile court as part of a criminal proceeding. (testimony of [REDACTED]).

(weapon/contraband) and Manifestation Determination Review

58. On October 6, 2016, [REDACTED] was found to be in possession of a weapon and other contraband at school, specifically pepper spray, brass knuckles, two lighters, and a bottle of Robitussin. Stip. Exs. 7-8. The items were found after a student saw the brass knuckles

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A licensed professional counselor ("LPC") can evaluate and treat mental health disorders. N.C.G.S. 90-332. A licensed substance abuse counselor ("LCAS") can assess and treat individuals at risk of developing addictive disorders or disease with co-occurring disorders, and addictive disorder or disease. N.C.G.S. 90-113.31B (04).

and reported it to the administration. Stip. Ex. 7; (testimony of [REDACTED]). Suspension for the remainder of the school year was recommended ("second long-term suspension"). Id.

59. Shortly after the suspension, Hurricane Matthew hit Eastern North Carolina, and the Lenoir County Public Schools were closed for ten consecutive school days due to the storm and resulting floods.

60. At the time of the suspension, [REDACTED] did not realize that [REDACTED] evaluation under Section 504 was still ongoing. Stip. Ex. 7, p. 10; (testimony of [REDACTED]). When this was subsequently raised, the school scheduled a manifestation determination meeting to determine whether the conduct, possession of a weapon and contraband at school, was a manifestation of any suspected area of disability. (testimony of [REDACTED]); (testimony of [REDACTED]).

November 8, 2016 Manifestation Determination Review ("November 2016 MDR"):

61. The manifestation determination meeting took place on November 8, 2016 ("November 2016 MDR"). Stip. Exs. 34-35. This was approximately the 13th school day of suspension.

62. It is undisputed that an evaluation under the IDEA was not underway at the time of the suspension and that [REDACTED] had not been identified as a student eligible for EC services. Respondent held a manifestation determination under Section 504 because a Section 504 evaluation had been requested and [REDACTED] was a "suspected" student with a disability under Section 504.

63. The November 2016 MDR meeting included the [REDACTED], two teachers of [REDACTED], the school psychologist who had evaluated him, the chair of the school Student Support Team and school board's legal counsel. Stip. Ex. 35, p. 128. [REDACTED] and [REDACTED] both attended and were represented by counsel at the meeting. Id.

64. At the November 2016 MDR meeting, the team reviewed the available information, including: both psychological reports from spring 2016; the report from counselor [REDACTED] [REDACTED] (Stip. Ex. 27, not offered into evidence); and reports from [REDACTED] teachers on

his classroom performance and how they worked with him. Stip. Exs. 35, 41. The team determined that the conduct of bringing weapons to school was not a manifestation of any known or suspected area of disability. Stip. Ex. 35.

65. No evidence was introduced at hearing to support the proposition that [REDACTED] decision to bring the weapon and other contraband to school was caused by or directly related to any disabling condition.
66. Petitioner submitted a document she wrote during the suspension appeal process, in which she gave various reasons why [REDACTED] was in possession of the items, none of which were disability related. Pet. Ex. 12. The conduct that led to the suspension did not involve any of the behaviors identified in the note from [REDACTED] as characteristic of ODD (irritability, argumentativeness, defiance or noncompliance toward authority figures). (Stip. Ex. 27 not offered into evidence); (testimony of [REDACTED]).
67. [REDACTED] main justification for [REDACTED] decision to bring a weapon to school was Ms. [REDACTED] comment that [REDACTED] behaviors suggest a "significant lack of insight into the consequences of his behavior." Stip. Ex. 18, p. 46. Poor insight into consequences is not a disability; it is simply bad judgment.

Subsequent Events

68. After his October 2016 suspension, [REDACTED] was assigned to attend the alternative school, LCLA, for the remainder of the 2016-2017 school year. LCLA offers a full-time academic program in a small group setting. (testimony of [REDACTED]). [REDACTED] attendance at [REDACTED] this semester has been extremely sporadic, especially to his first class. Stip. Ex. 43. [REDACTED] is currently involved in criminal court proceedings, not only stemming from the weapon charge related to his October 2016 suspension, but also for larceny and alcohol violations incurred outside of school. (testimony of [REDACTED]).
69. After the October 2016 suspension, Respondent has offered on at least three occasions to assist [REDACTED] in obtaining a proper medical assessment of [REDACTED] to determine if he has a potentially disabling condition. Stip. Exs. 36 (11/22/16 Letter from [REDACTED]) and 40 (3/22/17 Letter from [REDACTED]); Res. Ex. 46 (minutes of 11/8/16 MDR meeting).
70. At the Resolution meeting on March 29, 2017, [REDACTED] presented a letter from [REDACTED] dated March 7, 2017. In his March 7, 2017 letter, [REDACTED], MS, LCAS, CRC, LPC, indicated that [REDACTED] had started treatment on July 14, 2016 to "address his defiant, anxiety, and substance abuse (marijuana) issues." Pet. Ex. 4, [REDACTED] indicated that [REDACTED] has done well to address his issues as he tries to continue his education and comply with rules at home, school, and in the community." Id. [REDACTED] did not diagnose [REDACTED] with anxiety and/or addictive disorder nor did he testify at the hearing.
71. After receiving this information, EC [REDACTED] made a written offer to Petitioner that included an expedited evaluation and eligibility determination, an

independent psychoeducational evaluation, and, if [REDACTED] was found eligible for special education, a review of the manifestation determination and consideration of compensatory education. Stip. Ex. 40; (testimony of [REDACTED]); (testimony of [REDACTED]). Petitioner [REDACTED] has not accepted any of these offers. Id.

CONCLUSIONS OF LAW

General Legal Framework:

1. To the extent the Findings of Fact contain conclusions of law, or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.
2. Petitioner and Respondent named in this action are properly before this Tribunal, and this Tribunal has personal jurisdiction over them.
3. As the party seeking relief, the burden of proof for this action lies with Petitioner. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005).
4. The Office of Administrative Hearings has jurisdiction over this case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. {1400 et seq. and implementing regulations, 34 C.F.R. Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed.
5. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 C.F.R. Parts 300 and 301.
6. Respondent is a local education agency receiving monies pursuant to the IDEA.
7. The controlling state law for students with disabilities is N.C. Gen. Stat. Chapter 115C, Article 9.
8. The Petitioner, as the party requesting the hearing, may not raise issues at the hearing that were not raised in the due process petition.
9. The Petitioner may not raise claims arising more than one year prior to the filing of this Petition unless the claim falls under an exception to the statute of limitations. 20 U.S.C. § 1415(f)(3)(C); N.C.G.S. 115C-109.6(b).
10. As the party requesting the hearing, the burden of proof lies with Petitioner and the standard of proof is by a preponderance of the evidence. See *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Actions of local board of education are presumed to be correct and Petitioners' evidence must outweigh the evidence in favor of the Board's decisions. See N.C.G.S. 115C-44(b).

Jurisdiction:

11. OAH is an independent, quasi-judicial agency established as part of the executive branch of government and has only those judicial powers necessary to accomplish the purposes for which it was created. *Employment Commn. v. Peace*, 128 N.C. App. 1, 8, 493 S.E.2d 466, 470 (1997). The General Statutes confer OAH with jurisdiction over "any matter relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education of a child, or a manifestation determination" under the IDEA. N.C. Gen. Stat. 115C-109.6; see also, 150B-22.1.
12. OAH does not have jurisdiction over claims arising under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), No Child Left Behind, or other claims not arising from the Individuals with Disabilities Improvement Education Act.
13. To the extent that Section 504 violations have occurred in this case, the Undersigned has no jurisdiction and those claims are dismissed with prejudice.

ELIGIBILITY AND FAPE ISSUES

ISSUE 1: Whether [REDACTED] is a "student with a disability" or a "suspected student with a disability" as defined by the IDEA, and if so, whether Respondent violated the provisions of the IDEA by failing to designate him as such ("Eligibility Issue")?

ISSUE 3: If [REDACTED] is a "student with a disability" or a "suspected student with a disability," whether Respondent provided him with a free appropriate public education during the 45-day alternative setting for a weapon violation and, thereafter, during the long-term suspensions the remainder of the 2016-2017 school year period ("FAPE Issue")?

Eligibility for the Protections of the IDEA:

14. To be entitled to a free appropriate public education ("FAPE") or the procedural protections of the IDEA, a petitioner must be a "child with a disability" as defined by the IDEA. If [REDACTED] is not a "child with a disability" as defined by the IDEA, then he is not entitled to a free appropriate public education nor to the procedural protections of the Act. See 20

U.S.C. 1415(a) (establishing procedural safeguards for "children with disabilities and their parents"); see also, e.g., *Alvin Independent Sch. District v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007) ("Because we find that A.D. does not qualify for special education services, we need not reach his final argument regarding AISD's alleged procedural errors."); *T.B. v. Bryan Independent Sch. Dist.*, 628 F.3d 240 (5th Cir. 2010) (in action for failure to timely evaluate and find student eligible, parents could not recover attorney fees because IDEA fee-shifting provision only applies to parents of students who have been determined to have a disability);

D.S. v. Neptune Township Bd Of Education, 264 Fed. Appx. 186, 189-90 (3rd Cir. 2008) (unpublished) ("there is no evidence that Congress intended IDEA to protect the rights of 'children with a disability who have not been determined eligible for special education services. . . ."

15. The IDEA defines a "child with a disability" as "a child evaluated in accordance with [IDEA procedures] as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." 34 C.F.R. 300.8(a).
16. Petitioner [REDACTED] testified at hearing that she believed [REDACTED] should have been found eligible as a student with a specific learning disability in reading because the [REDACTED] Evaluation showed a 24-point discrepancy between his reading comprehension and cognitive ability. (testimony of [REDACTED]); see Stip. Ex. 17, pp. 38-39. A "specific learning disability" is "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia." 34 C.F.R. 300.8(c)(10). The definition of specific learning disability excludes "learning problems that are primarily the result of . . . emotional disturbance, or of environmental, cultural, or economic disadvantage." Id.
17. Petitioner [REDACTED] asks that the Undersigned rely exclusively on the [REDACTED] Evaluation which showed a discrepancy and completely disregard the [REDACTED] Evaluation which did not. As Petitioners have the burden of proof by a preponderance of evidence in this case, the Petitioners are essentially asking the Undersigned to "flip a coin" as to which evaluation is applicable. The Undersigned declines to rule in this matter and this decision-making process is not acceptable to reviewing courts. Only a third evaluation would break the stalemate and [REDACTED] has rejected another evaluation.
18. Instead, the Undersigned must give deference to the educators. [REDACTED] testimony that, after two years of teaching [REDACTED] high school math, he saw no evidence of a reading disability is compelling. Moreover, [REDACTED] a former English teacher with 30 years of experience failed to testify that she observed any reading disability. [REDACTED] testimony tips the scale in favor of the validity of the [REDACTED] Evaluation results.
19. Based on Findings of Fact 20-35 and other evidence in the record, the Undersigned concludes that the evidence produced does not establish that [REDACTED] had a specific learning disability in reading or any other academic area during the 2015-2016 or 2016-2017 school years. The extremely low reading score produced by [REDACTED] testing was anomalous with [REDACTED] other test results and general classroom performance, and the

Respondent was within its rights to request follow-up testing. The follow-up testing produced evidence of average reading ability which is consistent with [REDACTED] testimony, and no evidence was introduced that would compel the Undersigned to disregard that second score.

20. Petitioner testified that she also believed he would qualify as a student with a serious emotional disturbance ("SED"), based on his anxiety and perhaps other mental health concerns such as depression. (testimony of [REDACTED]).

21. An "emotional disturbance" under the IDEA is:

a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

34 C.F.R.300.8

22. Despite multiple requests from the Respondent and the Undersigned, other than the ODD diagnosis, Petitioner was unable to produce any direct evidence of a medical diagnosis of anxiety disorder, depression, or any other medical or mental health disorder. The evidence Petitioner did provide reflected only a diagnosis of oppositional defiant disorder from a licensed professional counselor. Stip. Exs. 27, 38, 39. .

23. Even assuming, that there was sufficient evidence of a diagnosis of ODD, the evidence did not establish that [REDACTED] meets the criteria for eligibility as a student with a serious emotional disturbance, nor that he requires specialized instruction because of such a disability. See generally, *Springer v. Fairfax Coe Sch. Bd.*, 134 F.3d 659 (4th Cir. 1998) (outlining the difference between "social maladjustment" and an "emotional disturbance"

under the IDEA). The evidence presented was insufficient to support a conclusion that [REDACTED] has exhibited any of the characteristics outlined above "over a long period of time and to a marked degree," nor that his academic and behavioral difficulties must be attributed to a serious emotional disturbance.

24. Based on Findings of Fact 22, 26-37, 47-50. and other evidence in the record, the Undersigned concludes that the Petitioner failed to prove by a preponderance of the evidence that [REDACTED] qualified as a student with a serious emotional disturbance.
25. While Respondent may not have turned over every stone in its prior evaluation of [REDACTED], it has offered multiple times to assist Petitioner in obtaining a medical diagnosis. Respondent has also offered to re-evaluate [REDACTED] and to reconvene the IEP team to review his eligibility under the IDEA. Given the lack of evidence at hearing in support of eligibility, the Undersigned can offer no further relief to Petitioner beyond the re-evaluation and review that Respondent has already offered.
26. Respondent did conduct a series of procedural violations with respect to the eligibility process. Respondent failed to evaluate after the first written referral in November 2015 (Findings of Fact 6, 7, 12 & 14). With respect to the May 23, 2016 IEP meeting, the Respondent failed to: 1. provide Petitioner [REDACTED] with a complete copy of the [REDACTED] Evaluation (Findings of Fact 21-24, 36-40); 2. include a psychologist at the IEP meeting to interpret the evaluation results (Findings of Fact 38 & 39); 3. review the SED eligibility worksheet (Finding of Fact 41); and, 4. include [REDACTED] and all IEP team members ([REDACTED]) in the determination that [REDACTED] was not eligible for EC services (Findings of Fact 42-44).
27. Based on the Findings of Fact and Conclusions of Law, the preponderance of the evidence did not establish that [REDACTED] was eligible for special education services, therefore, the Petitioners [REDACTED] and [REDACTED] were not entitled to the procedural protections of the IDEA and [REDACTED] was not denied a free appropriate public education. Whether or not [REDACTED] educational placements during the 45-day alternative placements or his long-term suspensions were appropriate under the IDEA are moot issues since [REDACTED] did not qualify for EC services. The Petitioners' eligibility and FAPE claims must be dismissed.

MANIFESTATION ISSUE

ISSUE 2: If [REDACTED] is a "student with a disability" or a "suspected student with a disability," whether Respondent violated the requirements of the IDEA regarding discipline of students with disabilities, specifically about his suspensions on November 15, 2015 for drug possession and October 6, 2016 for weapon possession on school grounds ("Manifestation Issue")? .

Compliance with IDEA Disciplinary Procedures:

28. As outlined above, the procedural protections of the IDEA generally apply only to students who have been determined after proper evaluation to meet the eligibility criteria for special

education services under the IDEA, but [REDACTED] was not found eligible. There is one exception, however, and that is the discipline procedures contained in the Act. 20 U.S.C. § 1415(k)(5). The IDEA provides that students who have not been determined eligible for special education may still claim the disciplinary procedural protections "if the public agency had knowledge . . . that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." Id. (emphasis added).

29. Per N.C.G.S. 115C-107.3, "suspected children with disabilities" are "those in the formal process of being evaluated or identified as children with disabilities."
30. The procedural safeguards of IDEA apply only to suspected children with disabilities or identified children with disabilities. The Petitioners must establish that the Respondent had a basis of knowledge that [REDACTED] was a suspected child with a disability.
31. For a suspected child with a disability, this "basis of knowledge" is created by one of three circumstances:
 - a. the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
 - b. the parent of the child has requested an evaluation of the child pursuant to section (a)(1)(B) of [the Act]; or
 - c. the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

20 U.S.C.1415

Basis of Knowledge with Respect to the November 16, 2015 Long-Term Suspension for Drug Possession:

32. Respondent did not have a basis of knowledge that [REDACTED] was a suspected child with a disability before the November 16, 2015 long-term suspension.
33. None of the three circumstances for a basis of knowledge claim existed prior to November 16, 2015.
34. [REDACTED] did request an evaluation, in writing, but after being advised about the long-term suspension. This request should have triggered an expedited evaluation process. 20 U. S.C. § 1415(k)(5)(D)(ii); 34 C.F.R. 300.534 d

35. However, until the expedited evaluation process is completed, the student remains in the educational placement determined by the authorities which can include suspension or

expulsion without educational services. 20 U.S.C. 1415(k)(5)(D)(i)&(ii); 34 C.F.R. § 300.534

36. Even an identified EC student's placement can be unilaterally changed to an alternative setting for up to 45 days for drugs, weapons, or serious bodily injury violations of the code of student conduct. 20 U.S.C. § 1415(k)(1)(G) (i-iii)•, 34 C.F.R. 300.530(g) (1-3).

37. Based on Findings of Fact 3-6, the Undersigned concludes that for the November 16, 2015 long-term suspension, the Respondent had no basis of knowledge that [REDACTED] was a suspected student with a disability.

38. Respondent did not expedite the evaluation after the November 16, 2015 referral as

required by 20 U.S.C. 1415(k)(5); 34 C.F.R. 300.534(d)(2)(i). The evaluations were completed and eligibility determined on May 23, 2016, six (6) months after the first referral.

39. The second referral for testing was February 26, 2016. Evaluations for the second referral should have been expedited too. The eligibility meeting was held within the 90-day time limit but not in an expedited manner.

40. Based on Findings of Fact 6, 7, 13, 14, 18-35 and other evidence in the record, Respondent did not comply with the procedural requirements of the IDEA with respect to expediting the evaluation process for either the November 2015 or February 2016 referrals.

41. Ultimately, the IEP team determined that [REDACTED] was not a child with a disability and not eligible for EC services; therefore, the long-term suspensions were not changes in placement or a denial of FAPE.

42. Once "the child has been evaluated and it was determined that the child was not a child with a disability" under the Act, then the "basis of knowledge" provision does not apply. 20 U.S.C. 1415(k)(5)(C).

43. After the May 23, 2016 eligibility determination that [REDACTED] was not a child with a disability, the basis of knowledge provision terminated.

[REDACTED] Based on foregoing Findings of Fact and Conclusions of Law, the Undersigned rules that Respondent complied with the disciplinary protections of the IDEA with respect to [REDACTED]

November 2015 long-term suspension but did not expedite the evaluation process.

Basis of Knowledge With Respect to the October 6, 2016
Long-Term Suspension for a Weapon/Contraband Possession:

45. Using the basis of knowledge provision again, Petitioners asserted that the Respondent should have held a manifestation determination review within 10 days of the October 6, 2016 long-term suspension.
46. There is an exception to the basis of knowledge provision. Per the IDEA, if the "child has been evaluated and determined that the child is not a child with a disability under this part, the local educational agency shall not be deemed to have knowledge." 20 U.S.C. §(5)(C); 34 C.F.R. 300.534@). (emphasis added).
47. Based on Findings of Fact 36-50 and other evidence in the record after the May 23, 2016 eligibility determination, the Undersigned concludes that the Petitioners failed to prove by a preponderance of evidence that the Respondent had a "basis of knowledge" that [REDACTED] was a student with a disability in need of special education, because he fell under the "exception" for students who have already been evaluated and deemed ineligible as of May 23, 2016.
48. Although new information had been provided to the school on September 29, 2016 after the IDEA evaluation, in the form of a document completed by [REDACTED], the information contained in that form was not sufficient to give rise to a new "basis of knowledge" as defined by the IDEA.
49. Based on Findings of Fact 52-67 and other evidence in the record even if the "basis of knowledge" provision was applicable, no violation of the IDEA resulted, because Respondent complied with the disciplinary protections of the IDEA after [REDACTED] suspension even though [REDACTED] asked for a Section 504 referral not an EC referral.
50. The IDEA permits students with disabilities to be suspended for more than 10 days — and up to the same length of time a nondisabled student would be suspended if the conduct in question was not a manifestation of the student's disability. 20 U.S.C. 1415(k)(1)(B)
51. A manifestation determination must be made by "the local educational agency, the parent, and relevant members of the IEP team" after a review of "all relevant information in the student's file." Id. If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP, then the conduct is determined to be a manifestation of the child's disability. Id. In such a case, the child must be returned to the placement from which he was removed, unless the parent and the LEA agree to a change of placement. 20 U.S.C. 1415(k)(1)(F).
52. If the conduct was not a manifestation of the child's disability, the student can be suspended long-term. 20 U.S.C. § 1415

53. After [REDACTED]'s October 2016 suspension, [REDACTED] School convened a team of individuals knowledgeable about the student, including a school psychologist who had evaluated him, an LEA representative, and his guardian. .
54. The team complied with the procedural requirements of 20 U.S.C. 1415(k)(1)(E) in reaching its determination that the conduct in question, possession of a weapon at school, was not a manifestation and the Petitioners failed to prove by a preponderance of the evidence produced at hearing that the behavior of carrying a weapon and contraband was a manifestation of any disability.
55. The manifestation meeting was not held within 10 school days of the decision to suspend [REDACTED] as would be required if the "basis of knowledge" provision applied. 20 U.S.C. § 1415(k)(1)(E). However, this delay did not result in educational harm, first because, as outlined above, the Undersigned determines that the "basis of knowledge" provision under IDEA did not apply, and second because even if the Respondent did have a "basis of knowledge," the team correctly determined that the conduct was not a manifestation.
56. Based on foregoing Findings of Fact and Conclusions of Law, the Undersigned rules that the Respondent complied with the disciplinary protections of the IDEA with respect to [REDACTED] October 2016 long-term suspension.

PROCEDURAL VIOLATIONS

57. Even though ultimately, [REDACTED] was found ineligible, suffered no educational harm under the IDEA, and not entitled to the procedural safeguards of IDEA, the Respondent's school staff committed numerous procedural violations in the referral and eligibility process which should be noted for future eligibility determinations.
58. The procedural violations are Respondent's: 1. failure to accept the first IDEA referral dated November 16, 2015; 2. failure to provide a Prior Written Notice for the November 16, 2015 unilateral decision to refuse the first referral by the assistant principal; 3. failure to expedite the evaluations after both the first referral and second referral on February 26, 2016; 4. failure to provide a complete copy of the [REDACTED] Evaluation at the May 2016 eligibility meeting; 5. Failure to allow the Petitioners (and other IEP team members) meaningful participation in the eligibility determination and thereby predetermining that [REDACTED] did not qualify as a child with a specific learning disability; and, 6. failure to evaluate [REDACTED] in all suspected areas of disabilities including serious emotional disturbance and other health impaired.
59. Had [REDACTED] been eligible for EC services, the cumulative effect of these violations would have risen to the level of educational harm and been a violation of IDEA. Regrettably, because [REDACTED] was ineligible, the Undersigned cannot award a remedy for these procedural violations.
60. Because of the potential harm to unidentified high school students especially minorities, the Undersigned does recommend that the Respondent conduct extensive training with the

high school staff and administrators at [REDACTED] and the [REDACTED] about the referral process and their responsibilities under IDEA.

61. The Undersigned also recommends that the Respondent follow through with its offer to have [REDACTED] independently evaluated for academic/mental health disabilities and reconvene the IEP team for purposes of eligibility, placement, and compensatory education.

SECTION 504 AND OTHER CLAIMS

62. The Undersigned makes no Findings of Fact or Conclusions of Law with respect to any Section 504 claims, except to note that Petitioners have exhausted the administrative remedies requirement.
63. To the extent this Order does not specifically address any other claim raised in the Petition, the Undersigned concludes that Petitioners failed to meet their evidentiary burden, and those claims must be dismissed with prejudice.

THEREFORE, the Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law above.

FINAL DECISION

BASED upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, it is hereby ORDERED, ADJUDGED, AND DECREED that:

1. Petitioners have failed to prove, by a preponderance of the evidence, that [REDACTED] is a "child with a disability" as defined by the IDEA;
2. Petitioners have failed to prove, by a preponderance of the evidence, that [REDACTED] was entitled to assert the procedural protections of the IDEA regarding his November 2015 and October 2016 long-term suspensions.
3. In the alternative, if Respondent was deemed to have a "basis of knowledge," Respondent complied with the procedural provisions of the IDEA by convening a manifestation determination review meeting, and Petitioners failed to prove by a preponderance of the evidence that [REDACTED] conduct was a manifestation of any known or suspected disability;
4. Because Petitioners failed to prove that [REDACTED] was a "child with a disability," [REDACTED] was not entitled to a free appropriate public education or the procedural safeguards under the IDEA; and,
5. Petitioners have failed to carry their burden of proof on all issues herein, and any other claims raised in the Petition, and accordingly is not entitled to any relief in this special education contested case.

IT IS HEREBY ORDERED that all of Petitioners' claims are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.


NOTICE

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. 115C106.1 et seq.) and particularly N.C.G.S. 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section. '

Inquiries regarding further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required close of the appeal filing period.

This the 1 Ith day of May, 2017.

A handwritten signature in black ink, reading "Stacey Bice Bawtinheimer", written over a solid black horizontal line.

Stacey Bice Bawtinheimer
Administrative Law Judge

CERTIFICATE OF SERVICE

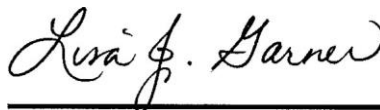
The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501 (4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service:

Lou Jones
2031 Christian Lane
Kinston NC 28504
Parent

Bill Elvey
North Carolina Department of Public Instruction due
process@dpi.nc.gov
Affiliated Agency

Eva Blount DuBuisson
Tharrington Smith, LLP
eva@tharringgonsmith.co
m
Attorney For Respondent

This the 1 Ith day of May, 2017.

A handwritten signature in cursive script, reading "Lisa J. Garner", is written over a solid horizontal line.

Lisa J Gamer
North Carolina Certified Paralegal
Office of Administrative Hearings
6714 Mail Service Center
Raleigh NC 27699-6700
Telephone: 919-431-3000